SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0362-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LARRY PULCINE,

Defendant-Appellant.

Argued January 25, 2022 – Decided March 2, 2023

Before Judges Currier, DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 17-05-0447.

Stephen W. Kirsch, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Stephen W. Kirsch, on the brief).

Andre R. Araujo, Assistant Prosecutor, argued the cause for respondent (Jennifer Webb-McRae, Cumberland County Prosecutor, attorney; Andre R. Araujo, of counsel and on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Defendant Larry Pulcine appeals his convictions after a jury trial of first-degree murder and related charges, as well as his resulting aggregate fifty-year sentence. We affirm defendant's convictions and sentence with one exception: because the trial court ordered restitution without holding an ability-to-pay hearing, we vacate that aspect of defendant's sentence and remand for further proceedings with respect only to restitution.

I.

On October 10, 2016, defendant, his brother Charles Pulcine, Richard Sperrazza, and Ivan Scott Strayer were staying at a Vineland hotel. The four were employed by an electric utility company and were in New Jersey on an assignment. Defendant and his brother were sharing Room 405. Sperrazza and Strayer were staying together across the hall in Room 404. Their foreman, Mark Knowles, was staying alone in a room near the rest of the crew.

The crew finished their work for the day and returned to the hotel in the early evening. Sperrazza and Strayer went to a nearby restaurant to eat, drink,

and watch television. Defendant and Charles left the hotel to purchase fast-food they intended to eat in their room.[1]

At about 8:00 p.m., Strayer returned to the hotel and went to his room. Shortly before 10:00 p.m., defendant and Charles also returned to the hotel. They went to the front desk and obtained two room keys. They expressed uncertainty as to whether they were staying in Room 405 or Room 404 and obtained one key for each room. The two then went to Room 405 to eat dinner.

Sperrazza returned to the hotel shortly thereafter. According to Sperrazza, when he entered Room 404, Strayer was in bed sleeping and the television was on. Charles invited Sperrazza to Room 405 to eat and drink beer. Sperrazza accepted the invitation, leaving his room about ten minutes later. He later returned to Room 404 to retrieve more beer. Sperrazza testified that when he entered the room at that time, Strayer was in bed and the television was off. At some point while Sperrazza was in Room 405, defendant left the room for a period of time, ostensibly to put quarters in the dryer in the hotel's laundry room.

When Sperrazza decided to call it a night, he returned to Room 404. He testified that when he entered the room it was dark and the television was off.

[1] Because defendant and his brother share a surname, we refer to Charles by his first name to avoid confusion. No disrespect is intended.

He used the light from his cellphone to guide him to his bed. Sperrazza got into bed and fell asleep without turning on the lights.

The next morning, Sperrazza woke up at about 5:00 a.m. When he turned on the lights, he saw that Strayer was lying in his bed lifeless and bloody. Finding no signs of life, Sperrazza ran out of the room only in his underwear and with no key, the door slamming behind him. Sperrazza rushed to Knowles's room and told him what he saw. Because Sperrazza had locked himself out of the room, Knowles went to the front desk to obtain a key to Room 404. Police were notified.

At about this time, defendant and Charles were returning to their room from getting coffee. Sperrazza, who was in the hallway outside his room upset and crying, told them what he saw, describing Strayer as being "fucked up." Sperrazza's description of Strayer's condition led Charles to believe Strayer had gotten drunk and did not want to go to work. Charles instructed Sperrazza to tell Strayer to stop fooling around, get up, and get ready to leave for work. Defendant told Sperrazza to "go back to bed; you're fucking drunk." Charles returned to Room 405. Defendant left the hotel.

Police arrived at Room 404 shortly thereafter. In the room, they recovered projectiles and shell casings from a .40-caliber handgun near the lifeless Strayer.

An autopsy later revealed that Strayer had been killed by four shots from a .40-caliber handgun registered to defendant. In defendant's room, police found both .380- and .40-caliber handgun ammunition.

After about six hours, defendant returned to the hotel, wearing a different shirt from the one he had on when he left. Officers arrested defendant and took him to the police station for questioning. During the interrogation that followed, defendant explained his disappearance by claiming that after Sperrazza told him and Charles that Strayer was "fucked up," defendant assumed Strayer had been assaulted by a stranger. At that moment, defendant heard a click that sounded to him like an exit door to the hotel closing. Believing the person who assaulted Strayer was escaping, defendant dashed down the stairs at the opposite end of the hotel and exited to the parking lot, hoping to apprehend the assailant. Although he passed a police officer entering the hotel as he exited, defendant did not stop or alert the officer that he believed he was in pursuit of the person who assaulted Strayer.

Instead, defendant claims, he searched the parking lot for the assailant. Having not found anyone suspicious, he noticed a figure crouching down in brush, or near a retention pond, in a field adjacent to the hotel. According to defendant, he entered the field and encountered the assailant, who struck him,

possibly with a stick, knocking defendant to the ground and escaping. Defendant then chased the assailant deep into a wooded area, where he became disoriented, lost track of the assailant, and could no longer see the hotel. According to defendant, he spent the next approximately five or more hours wandering, and sometimes crawling, through tall brush, sand, woods, and water, unable to find his way back to the hotel. Defendant claimed that the shirt he was wearing when he left the hotel got caught in briars and rather than attempt to free himself from the brush, he took off the shirt and left it there. Ultimately, defendant appeared at a butcher shop several miles, and across a four-lane State highway, from the hotel. Defendant could not recall how he crossed the highway.

At the butcher shop, defendant asked to use a telephone. Although he initially said that he attempted to call his girlfriend but only reached her voicemail, he later admitted that he spoke with her and asked if she had heard from Charles. Police later observed a text on Charles's cellphone from defendant's girlfriend saying that defendant was at Joe's Butcher Shop and Charles should "hurry" there. Defendant could not identify the owner of a telephone number he wrote on a receipt while at the butcher shop. Defendant did not call the police from the butcher shop to report his pursuit of the assailant

he believed he saw in the field. He instead walked a few miles back to the hotel and, once there, entered his room to sleep.

During the interrogation, defendant admitted he owned a .380-caliber handgun, but initially denied remembering whether he brought it with him to New Jersey. Ultimately, he admitted that he did have that handgun with him and that he brought it into the field when he chased the assailant. He speculated that he may have dropped the handgun during his struggle with the assailant or that it fell from the pocket of his shirt. At that time, defendant did not admit owning a .40-caliber handgun or having brought it with him to New Jersey.

Later, in the woods behind the hotel, police recovered the red flannel shirt that defendant was wearing that morning, as well as a room key. In addition, the officers recovered two handguns, defendant's .380-caliber handgun and the murder weapon, defendant's .40-caliber handgun, as well as a gun holster. Both guns had their ammunition magazines removed and had live rounds in their chambers.

Surveillance video showed defendant leaving the hotel in a red flannel shirt on the morning Strayer was found dead. There is no video of a person leaving the hotel just before defendant left the building.

A grand jury indicted defendant, charging him with: (1) first-degree knowing and purposeful murder, N.J.S.A. 2C:11-3(a)(1), (2); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and two counts of second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b).

Before trial, defendant moved to suppress the statement he made during his interrogation at the police station. He relied on two arguments: (1) he did not knowingly, intelligently, and voluntarily waive his Miranda[2] rights; and (2) he invoked his right to terminate the interrogation several times, but detectives either ignored his unequivocal invocations, or, if the invocations are considered to be equivocal, failed to inquire whether he was making an invocation.

After holding an evidentiary hearing and reviewing a video recording of the interrogation, the trial court issued a written opinion rejecting defendant's claim that he did not make a knowing, intelligent, and voluntary waiver of his Miranda rights. The court found that a detective read defendant each of his Miranda rights from a standard form and asked him to initial the form if he understood those rights. In addition, the court found that the detective sufficiently answered two questions raised by defendant: one with respect to his right to appointed counsel and one with respect to his right to withdraw the

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

waiver of his rights at any time. In addition, the court rejected defendant's argument that a lack of sleep deprived him of the ability to make a knowing, intelligent, and voluntary waiver of his rights.

The trial court also examined four statements identified by defendant as invocations of his right to terminate the interrogation. The court found that the first three statements – "You have my statement," "I'll take your card, if I think of something, but like I said if I laid down for a little bit, I'd probably get up and be like ahh hey," and "But that's all the information I have now," – were not unequivocal or equivocal invocations of his right to terminate the interrogation. However, the court found that the fourth statement, "That's my full statement. If I can remember anything else, I would love to give you a call," was an unambiguous invocation of his right to remain silent that was not respected by the detectives. Thus, the court granted defendant's motion to suppress all statements he made after that point.

The jury convicted defendant on all counts of the indictment. The trial court sentenced defendant to an aggregate fifty-year term of imprisonment with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. In addition to fees and penalties, the court imposed $5,000 in restitution.

This appeal followed. Defendant makes the following arguments:

> POINT I
>
> THE JUDGE SHOULD HAVE GRANTED THE DEFENDANT'S MOTION TO SUPPRESS HIS ENTIRE STATEMENT BECAUSE WHEN DEFENDANT EXPRESSED CONFUSION ABOUT ONE OF HIS MIRANDA RIGHTS, POLICE FAILED TO CLARIFY THAT RIGHT, AND INSTEAD MISINFORMED HIM OF THE PARAMETERS OF THAT RIGHT; ALTERNATIVELY, THE MOTION SHOULD HAVE BEEN GRANTED BECAUSE DEFENDANT MADE AT LEAST AN EQUIVOCAL ASSERTION OF HIS RIGHT TO SILENCE THAT THE POLICE IGNORED RATHER THAN CLARIFIED.
>
> POINT II
>
> THE PROSECUTION BLATANTLY VIOLATED HEARSAY RULES TO DEFENDANT'S DETRIMENT WHEN THE LEAD DETECTIVE WAS ALLOWED TO TESTIFY, OVER DEFENSE OBJECTION, THAT THE REASON HE INTERVIEWED DEFENDANT'S BROTHER TWICE WAS THAT THE INITIAL STORIES HE GOT FROM DEFENDANT AND HIS BROTHER WERE DIFFERENT FROM ONE ANOTHER – THEREBY INFORMING THE JURY THAT DEFENDANT'S BROTHER HAD GIVEN POLICE OUT-OF-COURT STATEMENT(S) THAT EFFECTIVELY INCRIMINATED DEFENDANT BY SAYING SOMETHING DIFFERENT THAN DEFENDANT HAD.

POINT III

THE PROSECUTOR WENT FAR OUTSIDE THE BOUNDS OF PROPRIETY WHEN HE: (1) ARGUED TO THE JURY THAT DEFENDANT MADE "NO MENTION AT ALL, NOT EVEN A WORD" ABOUT THE .40-CALIBER HANDGUN IN HIS STATEMENT TO POLICE WHEN, IN FACT, THE PROSECUTOR KNEW THAT ASSERTION TO BE FALSE AND KNEW THAT JUST SUCH A "MENTION" OCCURRED, BUT IN THE SUPPRESSED PORTION OF THE DEFENDANT'S STATEMENT; (2) ARGUED TO THE JURY THAT DEFENDANT "CHANGE[D]" HIS STATEMENT IN A SIGNIFICANT WAY, BUT KNOWING THAT THAT "CHANGE" OCCURRED IN THE SUPPRESSED PORTION OF THE STATEMENT; (3) SUBMITTED A REDACTED TRANSCRIPT OF THE DEFENDANT'S STATEMENT THAT WAS 100 PAGES LONG, BUT WHICH INFORMED THE JURY THAT THERE WERE 47 PAGES OF INTERROGATION THAT JURORS WERE NOT GETTING TO SEE. (RULING ON FIRST ERROR AT 15T 87-3 TO 89-25; OTHER TWO ERRORS WERE NOT RAISED BELOW).

POINT IV

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE AND RESTITUTION WAS IMPOSED WITHOUT REFERENCE TO THE ABILITY TO PAY.

II.

A.

We begin with defendant's argument that the trial court erred when it found he made a knowing, intelligent, and voluntary waiver of his Miranda rights. "An appellate court reviewing a motion to suppress evidence in a criminal case must uphold the factual findings underlying the trial court's decision, provided that those findings are 'supported by sufficient credible evidence in the record.'" State v. Boone, 232 N.J. 417, 425-26 (2017) (quoting State v. Scriven, 226 N.J. 20, 40 (2016)). Findings of fact are overturned "only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). However, we owe no deference to conclusions of law made by the trial court, which are reviewed de novo. Boone, 232 N.J. at 426.

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and this state's common law, now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." State v. S.S., 229 N.J. 360, 381-82 (2017) (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). "Our law maintains 'an unyielding commitment to ensure the

proper admissibility of confessions.'" State v. Sims, 250 N.J. 189, 211 (2022) (quoting State v. Vincenty, 237 N.J. 122, 132 (2019)).

"[A] knowing, intelligent, and voluntary waiver" of Miranda rights "is determined by the totality of the circumstances surrounding the custodial interrogation based on the fact-based assessments of the trial court." State v. A.M., 237 N.J. 384, 398 (2019); see also State v. Presha, 163 N.J. 304, 313 (2000). When making this analysis, courts consider the defendant's age, education, and intelligence, whether he or she was advised of his constitutional rights, the length of the detention, whether the interrogation was repeated and prolonged, and whether physical punishment or mental exhaustion were involved. Nyhammer, 197 N.J. at 402. Because New Jersey provides greater protections than afforded under federal law, Vincenty, 237 N.J. at 132, "our review of police-obtained statements is 'searching and critical' to ensure protection of a defendant's constitutional rights." State v. Burney, 471 N.J. Super. 297, 314 (App. Div. 2022) (quoting State v. Patton, 362 N.J. Super. 16, 43 (App. Div. 2003)). "[F]or the statement to be admissible, the court must find it was voluntary beyond a reasonable doubt." Id. at 315.

Having carefully reviewed the record, including the video recording of defendant's interrogation, we find no basis on which to reverse the trial court's

finding that defendant knowingly, intelligently, and voluntarily waived his Miranda rights beyond a reasonable doubt.

Defendant first argues that the detective who interrogated him impermissibly minimized the significance of the Miranda warnings, and invalidated defendant's waiver of his rights, during the following exchange:

> [Detective:] Alright, this is just, standard stuff I'm gonna read you when we talk to people about [indiscernible] ah Miranda.
>
> [Defendant:] Okay.
>
> [Detective:] I'm gonna read it to you, you just say if[3] you can understand it. It's real simple, you ready[?][4]

The trial court's written opinion does not specifically address these comments. They appear, however, to have been a component of the totality of the circumstances considered by the court in its analysis of defendant's waiver

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[3] Although the transcript of the interrogation does not include the word "if," the trial court found that the video recording clearly depicted the detective saying "if" at this point in the dialogue. Defendant does not challenge this finding.

[4] Defendant also argues that the detective minimized the significance of the Miranda warnings by calling them "no big deal." However, the portion of the transcript cited by defendant in support of this argument reveals the detective's comment did not refer to the Miranda warnings. Instead, after defendant said he did not know the number of the cellphone he had been using in New Jersey, the detective responded, "Okay, no big deal" before proceeding to the subject of Miranda warnings.

argument. The trial court's implicit conclusion that the detective did not vitiate defendant's waiver by referring to the Miranda warnings as "standard stuff" and "real simple" is consistent with the holding in State v. O.D.A.-C., 250 N.J. 408 (2022), which was issued after oral argument in this appeal and guides our analysis.

In O.D.A.-C., the Court held that an officer's repeated minimization of the significance of Miranda warnings, "starting at the outset of the interrogation and continuing throughout," created reasonable doubt that the defendant in that case had made a knowing, intelligent, and voluntary waiver of his rights. Id. at 413. In that case, prior to obtaining a waiver, the officer characterized the Miranda warnings as "[j]ust a formality," id. at 414, and during the subsequent interrogation said that "[w]hat we talk about in here is between us," and is "confidential between us, it's staying here between us . . . ." Id. at 415 (emphasis omitted). Further into the interrogation the detective again said the Miranda warnings were a "formality" and that "whatever you're saying here, it may be hard to believe that it's not going to work against you . . . ." Id. at 416 (emphasis omitted). Finally, the detective said that "[a]nything you say, like I said, is only going to help you, it's not going to hurt you." Id. at 417 (emphasis omitted).

Concluding that the detective's "formality" remarks were "problematic," id. at 421-22, the Court explained,

> [r]eferring to Miranda warnings as a "formality" . . . downplays their significance. Doody v. Ryan, 649 F.3d 986, 1002-03 (9th Cir. 2011) (en banc). The label suggests that Miranda warnings are little more than a box on a bureaucratic checklist waiting to be checked off – and that is simply wrong. Miranda warnings are a constitutional requirement meant to protect a person's rights under the Fifth Amendment; they are not a formality. To describe them in that way minimizes their import and undermines "the very purpose of Miranda." Ross v. State, 45 So. 3d 403, 428-30 (Fla. 2010) (criticizing a reference to the warnings as "just a matter of procedure").
>
> [Id. at 422.]

The Court, however, "decline[d] to adopt a bright-line rule that would require suppression any time an officer makes an improper comment during an interrogation." Id. at 423. Instead, the Court held that "the totality-of-the-circumstances test can both root out improper police statements that result in an invalid waiver and recognize knowing and voluntary waivers." Ibid. Applying that test, the Court found that in addition to twice improperly characterizing the Miranda warnings as a "formality," the detective's "comment about confidentiality weighs heavily against the admissibility of the statement" and was compounded by his comment that anything said by the defendant to the

detective was "not going to work against" him. Id. at 424. "Together," the Court concluded, "the misrepresentations call into question defendant's understanding of his rights." Ibid. The Court held that "because of the detective's repeated and varied efforts to undermine the Miranda warnings . . . the State did not shoulder its heavy burden and prove beyond a reasonable doubt that defendant's waiver was knowing, intelligent, and voluntary." Id. at 425.

Here, the detective characterized the Miranda warnings as "standard stuff," a comment less dismissive of the significance of Miranda rights than referring to them as "a formality." "Standard stuff" implies that the warnings are routinely administered, but does not suggest that they are insignificant in the manner that labeling them a "formality" does. In addition, the detective did not refer to the Miranda warnings as being "real simple." He instead was referring to the process for obtaining defendant's acknowledgment that he understood the warnings. The detective's comments here, like the "formality" comments in O.D.A.-C., are not, standing alone, sufficient to invalidate the subsequent waiver of defendant's Miranda rights.

Nor do we find a basis on which to reverse the trial court's conclusion that when those comments are considered in light of the totality of the circumstances, defendant's waiver of his Miranda rights was valid. In support of his argument,

defendant notes that after he indicated that he understood three of the warnings read to him by the detective, they had the following exchange:

> [Detective:] If you cannot afford an attorney one will be provided if you so desire prior to any questioning, you understand your rights?
>
> [Defendant:] [Indiscernible] I didn't understand that [indiscernible].
>
> [Detective:] Uh, if you cannot afford an attorney one will be provided if you so desire prior to any questioning.
>
> [Defendant:] Okay.
>
> [Detective:] Okay, and ah decision to waive these rights is not final and you may withdraw your waiver whenever you wish either before or during questioning, you understand that one?
>
> [Defendant:] Hum, not really.
>
> [Detective:] Basically what it means is you can talk to me all you want and then at some point if you say, you know, I don't wanna talk to you anymore you don't have to. That's just what that means. This says you acknowledge you've been advised of the constitutional rights found on the upper portion of this form, 1, 2, 3, 4, 5 which I just read to you and it says you understand each of those. I'm gonna have you initial 1, 2, 3, 4, and 5 and then sign that big long line.
>
> [Defendant:] Okay.
>
> [Detective:] It just says you understand all this.

Defendant argues that the detective, when clarifying the fifth warning, mischaracterized defendant's right to rescind the waiver of any of his Miranda rights by referring only to his right to rescind the waiver of his right to remain silent. We agree with the trial court's finding that the detective erred when he limited the explanation of the fifth warning to defendant's right to rescind the waiver of his right to remain silent. We also, however, find sufficient support in the record to sustain the trial court's conclusion that this error, when considered in light of all of the circumstances, did not vitiate defendant's waiver of his Miranda rights. Nothing in the record suggests defendant wanted to assert his right to counsel, of which he was informed, before or during the interrogation, but thought he was unable to do so once questioning began. In addition, after the detective's comment, defendant initialed the Miranda warnings form that contained the correct version of all five warnings, indicating that he understood those rights, although it does not appear that he read the form.

Nor did the trial court err when it concluded that defendant's purported state of exhaustion, when considered in light of the totality of the circumstances, vitiated the waiver of his Miranda rights. Although defendant appeared tired during his interrogation, and stated his desire to take a nap several times, the video recording does not depict him in a condition in which he is unable to

answer questions or maintain a meaningful dialogue with the detectives. To the contrary, defendant remained awake in a seated position, answered the questions posed to him, refused to answer questions on occasion, and offered explanations for inconsistencies in his answers. Nothing in the record suggests an inability on defendant's part to knowingly, intelligently, and voluntarily waive his Miranda rights.

B.

An individual's invocation of the right to remain silent must be "scrupulously honored." State v. Johnson, 120 N.J. 263, 282 (1990). The invocation "does not have to follow a prescribed script" nor must the individual "utter talismanic words[;]" individuals "unschooled in the law . . . will often speak in plain language using simple words, not in the parlance of a constitutional scholar." S.S., 229 N.J. at 383. When an individual makes a statement that "equivocal[ly] indicat[es]" a desire to remain silent, and police are "reasonably unsure whether the suspect [is] asserting that right," they should seek to clarify the individual's intentions. Johnson, 120 N.J. at 283.

Defendant relies on several statements he made as unequivocal or equivocal invocations of his right to terminate the interrogation and remain silent. He first cites his remark, "You have my statement." While this

declaration, standing alone, might be interpreted as an invocation of defendant's right to stop the interrogation, when it is considered in context, it is clear, as the trial court found, that defendant was merely expressing his intention not to answer any further questions about a particular subject. The remark followed several questions focused on why, when defendant purportedly exited the hotel in pursuit of a suspected assailant, he did not alert the police officer he passed about the suspect or pursuit:

> [Detective:] So you make it outside . . .
>
> [Defendant:] And then I started going, you know, I started going left and it's like cruising around I'm like oh, I'm out front, cause I was thinking I went down the other way, so I come all the way around and the police officer was coming in, I passed him and I just kept going and then come around the back and didn't really see anybody, so I just started walking toward the back of the parking lot to look to see if anybody's hiding or anything.
>
> [Detective:] So the police are there, the police are there when you got outside?
>
> [Defendant:] No, no, well they just went, were walking in . . .
>
> [Detective:] Alright, so just . . .
>
> [Defendant:] You know, they were already parked there or something and just walked in, like I come down the steps, come around, they're, he was already walking in there . . .

[Detective:] So you're going out, the police are coming in?

[Defendant:] Yeah.

[Detective:] And you don't tell the police that you think somebody might ah just ran out of the building?

[Defendant:] Well I figured that's what it was for, I didn't, but I was ah little, I didn't, I had just woke up.

[Detective:] Right, I understand that . . .

[Defendant:] You know, I can't make split decisions or think right away like that . . .

[Detective:] Right, but, but your buddy just, you made ah good enough, we're just trying to get to the bottom of it, but you made ah decision, you made ah good enough decision to hear, that you heard the door click, so you're going to chase somebody, you know what I mean?

[Defendant:] I just . . .

[Detective:] And then you're going outta the building and the and the cops are coming in?

[Defendant:] You have my statement.

[Detective:] What's that?

[Defendant:] I'm sorry, you have my statement. I just don't see why you're eh, when we just went over this three times. I'm sorry . . .

Defendant then engages in a dialogue with the detective about the need to repeat questions to clarify defendant's responses and then continues to answer questions posed to him.

There is sufficient support in the record for the trial court's conclusion that, when considered in context, defendant's remark conveyed his intention to stop answering questions about the police officer he passed while exiting the hotel, and not to terminate the interrogation. A defendant may elect to not provide further details with respect to an area of inquiry while not invoking his right to terminate the interrogation. See e.g. State v. Kucinski, 227 N.J. 603, 623 (2017) ("[C]onsidered in context, defendant's refusal to answer certain questions was not an attempt to end the dialogue, but rather as 'part of an ongoing stream of speech.'").

There is also sufficient support in the record for the trial court's conclusion that the following remarks do not constitute invocations of defendant's right to terminate the interrogation:

> [Detective:] We don't want to leave any stones unturned.
>
> [Defendant:] [Indiscernible]
>
> [Detective:] For, I mean for him and his family you know my God.

[Defendant:] You know uh, absolutely, you know.

[Detective:] Yeah.

[Defendant:] If there is anything I can think of or come up with you now definitely.

[Detective:] Right.

[Defendant:] I mean make sure I, I get a card off of each of ya and do something you know?

. . . .

[Defendant:] I mean I, you know if I, I'll take your card, if I think of something, but, like I said, if I lay down . . .

[Detective:] Um hum.

[Defendant:] For a little bit, I'd probably get up and be like ahh hey.

As the trial court aptly noted, these statements are not indications of defendant's desire to stop the interrogation, but to continue to communicate with the detectives after the interrogation ended if any further information comes to his mind. See State v. Diaz-Bridges, 208 N.J. 544, 570 (2012).

Finally, we find no basis to reverse the trial court's conclusion that the following exchange, after defendant's revelation that he spoke with his girlfriend over the telephone from the butcher shop, did not constitute an invocation by defendant of his right to remain silent:

> [Detective:] But the State [indiscernible] just so you know, this is how it works. You give us information, then we verify that information. Right? So . . . .
>
> [Defendant:] But that's all the information I have now.
>
> [Detective:] Well the State Police is gonna go talk to your girlfriend.
>
> [Defendant:] Okay
>
> [Detective:] Alright, they're gonna pick her up and they're gonna drag her in and they're gonna talk to her and they're gonna ask her . . .
>
> [Defendant:] It might be a little different. I might uh said three more words than I told you, but I still called home.

As the trial court found, defendant's statement is not an expression of a desire to terminate the interrogation. He indicated he had no further information regarding the content of his conversation with his girlfriend. Once informed the State Police intended to interview his girlfriend, defendant introduced the possibility that his prior account of the conversation may not be accurate.

C.

We are not persuaded by defendant's argument that the trial court erred when it permitted a detective to testify at trial about the reason he decided to

interview Charles twice. The relevant exchange between the assistant prosecutor (AP) and the detective follows:

> [AP:] I'd ask you to take a look at the second page [of the transcript of the interview of Charles], see if that refreshes your memory as to why you went back to interview Charles.
>
> [Detective:] Yep.
>
> [AP:] So why did you interview Charles again?
>
> [Detective:] Well, I went back to try to get their stories to get together. They didn't – they weren't meshing. They were totally different stories. And I advised him that – I mean, here it says that; "I know it it's your brother, you know, but if he did something, I mean," ---

At that point, defense counsel objected, presumably on hearsay grounds. The trial court's resolution of the motion was terse:

> [Counsel:] You Honor, objection.
>
> [Court:] He said he stated.
>
> [Counsel:] Okay.

The subsequent testimony also was brief:

> [AP:] So what did you state again?
>
> [Detective:] I stated that; "I know it's your brother but, you know, and brothers protect each other but

there's some – if he did something, you know, let me know."

[AP:] All right. I have nothing further at this time, Judge.

Defendant argues that the detective's testimony was essentially hearsay because he implied that Charles had made an out-of-court statement that implicated defendant in Strayer's murder. We disagree.

"'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." N.J.R.E. 801(c). Hearsay is not admissible unless subject to a specific exception. N.J.R.E. 802.

It is well-established that "a police officer may not imply to the jury that he possesses superior knowledge, outside the record, that incriminates the defendant." State v. Branch, 182 N.J. 338, 351 (2005). "When the logical implication to be drawn from [an investigator's] testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt, the testimony should be disallowed as hearsay." State v. Bankston, 63 N.J. 263, 271 (1973). For example, an officer may not testify that he placed a defendant's photograph in an array because he had developed the defendant as a suspect based on information received during an investigation.

State v. Lazo, 209 N.J. 9, 21-24 (2012). While an officer "may testify that they took certain investigative steps based 'upon information received[,]' . . . they cannot repeat specific details about a crime relayed to them by [someone else] without running afoul of the hearsay rule." State v. Luna, 193 N.J. 202, 217 (2007) (quoting Bankston, 63 N.J. at 268).

We agree with the State's argument that the challenged testimony does not imply that Charles made an out-of-court statement implicating defendant in the Strayer murder. The detective testified that the statements of Charles and defendant did not "mesh." There are a number of reasons why Charles's statement might not "mesh" with the statement defendant gave during his interrogation, not all of which implicate defendant in Strayer's murder. In fact, the detective implied that Charles may have been protecting his brother when he gave his first statement, not implicating him in the murder. Although the detective testified that he told Charles that if defendant "did something," he should implicate him in his second statement, the officer did not testify that Charles had, in fact, subsequently given him information implicating defendant. We note as well that Charles testified at trial and defendant was free to cross-examine him on any aspect of his two statements to police.

Furthermore, defendant's counsel had informed the jury in his opening statement that he intended to question the thoroughness of the investigation, including the detective's decisions with respect to interviewing witnesses. The question challenged by defendant plainly was intended to counter defendant's argument that follow up interviews were not conducted to clarify discrepancies in witness accounts.

D.

Defendant argues the AP engaged in prosecutorial misconduct during his summation by making the following remarks:

> [AP:] And about those guns. What gun does he mention in his statement? The .380. He freely talks about this .380. Why? Because it's not the murder weapon. What gun does he conveniently leave[] out of his statement? The .40-caliber Beretta. No mention at all, not even a word.
>
> . . . .
>
> Who is evasive about the .380 initially? Who never mentions the .40-caliber that was in the room?

Defense counsel objected to these remarks, noting that three pages into the suppressed portion of defendant's statement he admitted that he owned a .40-caliber handgun. Thus, counsel argued, the remark was untruthful. The State countered that while defendant mentioned owning a .40-caliber handgun in the

suppressed portion of his statement, he did not admit having brought the .40-caliber handgun to New Jersey or having brought the gun with him into the woods, where it was found. According to the State, the intention of the AP was to highlight defendant's deliberate attempt to avoid admitting that he brought the murder weapon to the hotel and that it would be found in the woods with his other handgun. When the trial court asked defense counsel to identify the remedy sought if it were to sustain the objection, defense counsel stated that he did not want to highlight the issue before the jurors and asked the court not to take any corrective steps. The objection, therefore, was dropped with only a notation for the record that it had been made.

A prosecutor "must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." State v. Smith, 167 N.J. 158, 178 (2001). However, prosecutors do have "wide latitude in making their summations and may sum up 'graphically and forcefully,'" State v. Garcia, 245 N.J. 412, 435 (2021) (quotation omitted), so long as such comments are "reasonably related to the scope of the evidence presented." State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quotation omitted). "[A] prosecutor may not use a defendant's post-arrest silence against him." State v. Taffaro, 195 N.J. 442, 456 (2008). It is reversible error when a prosecutor

advances an argument that is contradicted by objective evidence excluded for reasons other than its authenticity. Garcia, 245 N.J. at 434-35.

Prosecutorial misconduct is reversible when it was "clearly and unmistakably improper" and "so egregious," considering the entire trial, that it deprived defendant of a fair trial. State v. Wakefield, 190 N.J. 397, 437-38 (2007). Several factors are relevant to the court's analysis: "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." State v. Frost, 158 N.J. 76, 83 (1999). A defendant is denied a fair trial when a prosecutor's "summation so 'substantially prejudice[s] the defendant's fundamental right to have the jury fairly evaluate the merits of [defendant's] defense. . . .'" Garcia, 245 N.J. at 436 (quoting State v. Bucanis, 26 N.J. 45, 56 (1958)).

We have carefully considered the AP's comments and find no basis on which to vacate defendant's convictions. We find the AP's explanation for his remarks, made immediately after defendant's objection, to be reasonable and supported by the record. It is accurate that defendant "talked freely" about the .380-caliber handgun in the context of his admission that he may have brought

it to New Jersey and, later, that he may have taken the weapon with him when he chased the alleged assailant into the woods. The AP accurately pointed out that defendant did not mention his .40-caliber handgun during these exchanges. Defendant's mention of the .40-caliber handgun in the suppressed portion of his statement was only a concession that he owned a handgun of that caliber, not that he had brought it with him to New Jersey or on his chase into the woods.

In addition, defendant argues that it was misconduct for the AP, in his summation, to make the following comment about his statement to police:

> [AP:] And the statement changes as well. Initially, it's, I heard the sound, it was down the other end of the hallway, so I went down the stairs right away. But once we get talking about guns and firearms, it's – in the rush, I could have gone into the room maybe. So he's not really consistent about his own story.

Defense counsel did not object to this statement. For the first time on appeal, defendant argues he first mentions the possibility of going into his room, where the .380-caliber gun may have been among his possessions, before running after a purported assailant in the suppressed portion of his statement. Defendant's argument, however, is factually incorrect. On pages ninety-three and ninety-four of the transcript of his statement, which were not suppressed, defendant stated, with respect to the .380-caliber handgun possibly posing a danger to children who played in the field behind the hotel, "In a rush, I might

uh grabbed it, but I, you know what I mean I had . . ." and "If, if anything you know it could of or would of fell out, because I didn't have it whenever I was lost."[5]

E.

We also reject defendant's argument that his sentence is excessive. "Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). We have reviewed the sentencing record and are satisfied that the judge's findings and balancing of the aggravating and mitigating factors are supported by adequate evidence in the record, and the sentence is neither inconsistent with sentencing provisions of the Code of Criminal Justice nor shocking to the judicial conscience. See State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Bieniek, 200 N.J. 601, 608 (2010); State v. Cassady, 198 N.J. 165, 180-81 (2009). We agree, however, that the trial court erred by ordering

[5] Defendant argues the State engaged in prosecutorial misconduct when it submitted a copy of the transcript of his statement that was correctly redacted to reflect the portions that had been suppressed, but which included two transcriber's certifications. The first certification stated that the first fifty-one pages of the transcript were accurate, with the second certification stating that "pages 51-147" were accurate. Defendant contends that the second certification tipped jurors off to the fact the portions of defendant's statement after page 100 had been suppressed. We find nothing in the record to suggest that the jury reviewed the transcriber's certifications, drew the inference suggested by defendant, or that such an inference, if drawn by the jury, affected the verdict.

$5,000 in restitution without holding an ability-to-pay hearing. See N.J.S.A. 2C:44-2(c)(1).

F.

We have considered defendant's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

The August 6, 2019 judgment of conviction and sentence are affirmed, with the sole exception of the restitution ordered by the trial court, which is vacated. We remand for reconsideration of restitution after an ability-to-pay hearing. We do not retain jurisdiction.